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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KERI EVILSIZOR, Plaintiff and Appellant, v. JOSEPH SWEENEY, Defendant and Respondent; JOHN EVILSIZOR et al., Objectors and Appellants.	A143054 (Contra Costa County Super. Ct. No. MSD1301648)

Appellants Keri Evilsizor and her parents, Mary and John Evilsizor, challenge an order requiring them to pay the attorney fees of respondent Joseph Sweeney, Keri's former spouse.[1] They argue that the trial court improperly (1) assumed that Keri had access to her parents' money to pay the award and (2) awarded fees that were not attributable to Mary and John's role as objectors in the proceedings. Keri separately challenges a different order denying her request to modify the surname she and Joseph gave to their daughter when she was born. We affirm both orders.

I.
FACTUAL AND PROCEDURAL BACKGROUND

This is the third time this court has considered an appeal in this dissolution proceeding. Joseph and Keri were married in November 2010 and had one child, a

[1] Because three of the parties in this opinion share a surname, we refer to all parties by their first names in the interest of clarity.

daughter, in November 2012. They separated in March 2013, and dissolution proceedings were initiated shortly thereafter. Keri's parents were later added as parties to the proceedings because assets under their control could be subject to disposition by the court.

The trial court has characterized this as a "highly contentious case," and the parties have litigated a number of issues. In *Evilsizor v. Sweeney* (2014) 230 Cal.App.4th 1304, we affirmed a sanctions award against John for failing to promptly withdraw a motion to quash a subpoena, and in *In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416, we affirmed a restraining order against Joseph to prevent him from disseminating information he had surreptitiously downloaded from Keri's mobile phones. This appeal concerns the orders briefly mentioned above that require Keri and her parents to pay Joseph's attorney fees and that deny Keri's request to modify the surname of Keri and Joseph's daughter.

II.
DISCUSSION

A. Award of Attorney Fees.

1. Factual background.

In July 2013, Keri was ordered to pay Joseph attorney fees in the amount of $10,000. She paid $5,000 but then sought relief from any further payment and sought to modify spousal support and visitation. Keri alleged that her father, John, had been her employer and had fired her in early August, which caused her to have "very little income," to be forced to close her credit cards, to exhaust her "small savings," and to "liquidate[] the last of [her] jewelry and personal property items of value to pay the court's previous order of support and attorney fees." Attached to her request to modify spousal support was a letter from John's attorney terminating her employment and explaining that John "cannot any longer justify spending such large amounts of money to bail you out of the financial obligations you continue to incur on a regular basis." In opposing Keri's requested modification, Joseph accused Keri of colluding with her parents to make it falsely appear that Keri had been fired.

In August 2013, Keri's parents sued Keri and Joseph for fraud and breach of promissory notes. Less than a month later, Keri agreed to a settlement that included a provision requiring her to give up her interest in a home she acquired while married to Joseph. The court ordered the parents' lawsuit joined with the divorce proceedings, directed that the dissolution proceedings should proceed to judgment first, and enjoined Keri from executing a settlement agreement with her parents as scheduled.

Following a hearing in October 2013, the trial court modified a previous order for spousal support so that neither party owed money to the other, scheduled an evidentiary hearing for the following May, and declined to otherwise modify its previous orders, including the order that Keri pay Joseph's attorney fees.

In January 2014, Joseph filed a request for attorney fees and costs under Family Code, section 2030,[2] which permits the trial court to order one party in a dissolution action to pay the other's attorney fees where there is a disparity in the ability to pay. Joseph sought $131,918.73 in fees and $870 in costs from John and Mary, and he sought $22,917.50 in fees and the remaining costs of a pending custody evaluation from Keri. Peter G. Loewenstein, an attorney who represented Joseph until Joseph ran out of funds to pay him, estimated he had spent between 35.5 to 51.5 hours on child-custody issues and between 99 to 124 hours on all other issues in the case.

John and Mary opposed Joseph's request and submitted declarations attesting that Joseph had misstated their assets and misrepresented relevant facts. Keri separately opposed the request also claiming that Joseph had misrepresented the state of the parties' finances.

After first addressing unrelated issues at a hearing on April 17, 2014, the trial court turned to the issue of attorney fees and concluded that it did not have enough information about John and Mary's ability to pay, about what their role in the dissolution proceedings would be, or about Keri's current income. The court ordered John and Mary

[2] All statutory references are to the Family Code unless otherwise specified.

to provide additional information about their finances and continued the motion until June.

The issue of attorney fees was addressed again in June, and the trial court again raised its concern with its ability to rule on it. The court observed that John and Mary had failed to provide the additional information, ongoing discovery disputes were pending about the parties' ability to pay, and the parties were still litigating John and Mary's joinder as parties. The trial court again ordered John and Mary to file an income-and-expense declaration, and it again continued the motion, this time to July, to allow the parties time to finalize the pleadings joining John and Mary as parties. In the meantime, the court ordered Keri to pay an additional $5,000 in attorney fees, subject to a possible future reallocation. Mary and John thereafter submitted an income-and-expense declaration and their 2012 tax return.

During argument on the request for attorney fees at the July hearing, Keri's attorney represented that Keri "has no resources . . . . She relies on the largess of her parents." When the trial court asked whether that meant Keri's parents were paying him (the attorney), he responded, "Yes, to my knowledge." After hearing argument from all parties, the trial court sided with Joseph, finding that Joseph did not have substantial assets, whereas Keri appeared to be receiving assistance from her parents to pay for the litigation. After reviewing John and Mary's income-and-expense declaration and 2012 tax returns, the court commented that John and Mary "have assets and income that are available to them to pay fees." The court then awarded Joseph $75,000 for past billings, with $15,000 to be paid by Mary and John and $60,000 to be paid by Keri; and it awarded Joseph $50,000 for future expenses, with $10,000 to be paid by Mary and John and $40,000 to be paid by Keri, subject to future reallocation. The trial court's order states: "The Court finds that with respect to [Keri's] ability to pay attorney's fees, the Court can count income from [Keri's] parents if it seems to be readily and regularly available, and it appears that it is. [Keri] had a very high income until she was ordered to pay [Joseph] support out of that income, and then suddenly she was terminated. [Keri's] parents seemed to be willing to continue to fund for litigation [*sic*] so the Court finds that

one way or another [Keri] has access to money to pay attorneys." The money was ordered to be paid immediately.

Mary, John, and Keri appealed from the award of attorney fees.[3] They were represented separately below but are jointly represented by a different attorney on appeal and have submitted joint opening and reply briefs.

2. Legal analysis.

a. The legal standards for awarding attorney fees under section 2030.

Section 2030 provides that the trial court in a dissolution proceeding "shall ensure that each party has access to legal representation . . . by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." In determining whether such an award is necessary, the trial court must determine whether the award and its amount "are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) "In deciding whether to award attorney fees, the trial court considers the parties' respective needs and incomes, including their assets and liabilities." (*In re Marriage of Bendetti* (2013) 214 Cal.App.4th 863, 868.) The court shall take into consideration several factors, including "[a]ny . . . factors the court determines are just and equitable." (§ 4320, subd. (n); see § 2032, subd. (b).) The trial court may award attorney fees payable by unrelated third parties who have been joined in the dissolution action. (*Marriage of Bendetti*, at p. 869; *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 40; § 2030, subd. (d).) "A motion for attorney fees is left to the trial court's sound discretion and will not be disturbed on appeal absent a clear showing of abuse," that is, " ' "only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made." ' " (*Marriage of Bendetti*, at pp. 868-869.)

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3 The denial of a subsequent request by Joseph for attorney fees is the subject of another pending appeal, No. A144781.

b. The trial court did not abuse its discretion in ordering Keri to pay $100,000 toward Joseph's attorney fees.

Mary, John, and Keri first argue that the trial court abused its discretion in ordering Keri to pay Joseph $100,000 in attorney fees because the income-and-expense declaration Keri filed before the order failed to demonstrate her ability to pay, and the court could not infer she could get the money from her parents. We disagree. When ordering one party to pay another party's attorney fees in a dissolution action, the trial court may "look[] to the economic reality of the situation, rather than the labels" the opposing party prefers to apply. (*In re Marriage of Smith* (2015) 242 Cal.App.4th 529, 534 [trial court did not abuse its discretion when it considered funds paid by party's father to party's attorney on her behalf].) Here, the trial court found that Keri, an attorney, had received substantial income from her parents for legal work she provided to them until John fired her shortly after she filed this dissolution action. Although the trial court had not yet ruled on the merits of Joseph's claims that Keri's termination was a fraud meant to obscure her true income when it granted Joseph's request for fees, the court clearly found the timing suspicious in light of its reference to Keri's "sudden[]" termination after she was ordered to pay Joseph support and its ultimate conclusion that "one way or another" Keri had access to money to pay the attorneys in this litigation.

We find the facts presented here analogous to those considered in *In re Marriage of Smith*, *supra*, 242 Cal.App.4th 529. In *Smith*, the trial court ordered the appellant to pay her ex-husband attorney fees under section 2030 based on the fact her father " 'was committed to paying [her] fees and costs whatever the amount,' " paying them with loans against her expected inheritance of $6 million. (*Marriage of Smith*, at p. 532.) As Keri argues here, the appealing spouse in *Smith* argued that the trial court should not have considered funds her father paid to her attorney on her behalf, but the appellate court disagreed. (*Id.* at pp. 533-534.) To exclude the father's funds from consideration "would vitiate one of the primary purposes of section 2030 and section 2032, to prevent one party from being able to 'litigate[] [the opposing party] out of the case,' by taking advantage of their disparate financial circumstances." (*Id.* at p. 534.) Although Keri's counsel was not

paid through loans from an inheritance, counsel acknowledged receiving payments from Keri's parents. Like the trial court in *Smith*, the trial court here "reasonably determined, at least under the circumstances of the present case, that it would be neither just nor equitable to" exclude funds from a parent from consideration. (*Id.* at p. 535; § 4320, subd. (n).) We conclude that "[t]he trial court acted within its discretion by rejecting [Keri's] plea of poverty for purposes of apportioning the overall cost of the litigation equitably between the parties." (*Marriage of Smith*, at p. 535.)

The cases upon which Mary, John, and Keri rely do not compel a contrary conclusion. For example, in *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, the court reversed an award of attorney fees under section 2030 to a wife because the trial court failed to consider her husband's ability to pay the fees, failed to evaluate whether the requested fees were reasonable, and issued its order without evidence of the nature and extent of the attorney services rendered. (*Marriage of Keech*, at pp. 867, 870.) Here, by contrast, the court twice deferred ruling on the request for attorney fees until it had financial information from all parties, and it considered the declaration of Joseph's counsel detailing the services rendered, a declaration the court found to be "quite thorough." As for *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, another case upon which appellants rely, the appellate court discussed whether loans and gifts to one spouse could be included when setting spousal and child support for the other spouse. (*Id.* at pp. 1312-1315.) Because the trial court in that case found based on substantial evidence that the parents were no longer making advances, the appellate court concluded that those funds could not be considered for purposes of support. (*Id.* at pp. 1315, 1317.) Here, by contrast, the trial court found that Keri's parents "seemed to be willing to continue to fund" litigation and that Keri continued to receive funds "one way or another."

Finally, we recognize that "[p]arents are not obligated to pay the costs of their children's divorces." (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 532.) *Schulze* concluded that it was error for a trial court to order a husband to pay his wife's fees "forthwith" because the husband had no savings or liquid assets and it was improper

for the court to assume the husband's parents would pay the fees simply because they had loaned him money in the past to pay his own fees. (*Id.* at pp. 531-532.) But the husband in *Schulze* had received from his parents only a relatively small one-time loan, while here substantial evidence was presented that Keri's finances have been intertwined with her parents' to a much greater extent. (See also *In re Marriage of Smith, supra,* 242 Cal.App.4th at p. 535 [distinguishing *Schulze*].)

c. The amount of the award Mary and John were ordered to pay was not an abuse of discretion.

Appellants also argue that the trial court abused its discretion by ordering Mary and John to pay $25,000 toward Joseph's attorney fees because the award was not proportionate to their involvement in the case. (See § 2030, subd. (d) [order requiring non-spouse to pay attorney's fees "shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party"].) They present their arguments as if the trial court was unaware of its duty to allocate the fees according to the parties' involvement in the case. To the contrary, the trial court was well aware that the law was "clear" that "when you bring in a third party, you only get to get fees for the part of the case that they are involved in from them. I don't think anybody doubts—actually disputes any of that. It's all in [Joseph's] application." Before it issued its final ruling on attorney fees, the court agreed with John and Mary's lawyer that "any participation by them [Mary and John] on attorney's fees has to be limited to the issues which their participation is relevant." Appellants argue that the trial court should have excluded fees that were incurred on Mary and John's civil lawsuit when it was separate from the dissolution, and it should have denied Joseph recovery for time he spent on the case when he was proceeding without an attorney. But the trial court specifically stated it was excluding these civil-action fees, and it recognized that Joseph was not seeking to recover for time he was proceeding in pro per when it explained that the documentation supporting the recovery for his *attorney's* time was "sufficient" to support the award. On appeal, appellants simply repeat the arguments that they made below but that were rejected by the trial court. We find no abuse of discretion on this record.

B. Keri's Petition to Modify the Daughter's Surname.

1. Factual background.

Keri has a son from a previous relationship. In 2007, she successfully petitioned to have the name Evilsizor added to his surname so that it is hyphenated with his father's last name. His birth certificate was changed, but he is known by the last name Evilsizor in his day-to-day life.

When Keri and Joseph's daughter was born in November 2012, she was given Joseph's surname, Sweeney, and she also shares Joseph's first and middle initials (J.J.). According to Joseph, he and Keri agreed that it was in their daughter's "best interest to have a short, normal name," and they felt that "a long, hyphenated last name would cause problems with records, did not sound good, and was unwieldy."

About a year after initiating dissolution proceedings, and while a custody evaluation was ongoing, Keri sought to change their daughter's surname from Sweeney to Evilsizor-Sweeney under Code of Civil Procedure section 1277. She wanted her daughter's birth certificate modified to include the hyphenated name and for her daughter to be known as Evilsizor in her daily life.

In support of her request, Keri attested that having both her daughter and son share a surname would "facilitate ease in our day-to-day activities," including school registration, medical and dental appointments, and air travel. Her "historical German surname" was "a great source of pride" to Keri, and she planned to keep the name Evilsizor even if she remarried. Keri contended it would be in her daughter's best interest to share the surname in order to promote ties with their extended family, stating that they live "in the Blackhawk community amongst my parents, siblings, cousins, aunts, and uncles. We do everything together as an extended family, from dinners, to family vacations, to school activities." Keri also contended that granting her daughter the name Evilsizor would "open doors" for her daughter because of her grandfather's (John's) "long-standing and well-respected reputation in the real estate community." According to Keri, John "is the founder of the Special Olympics, as well as the past President and District Governor's Representative of the Rotary," and sharing his name would benefit

the daughter "whether she is dedicating her energies to charitable pursuits, following in the long line of successful Evilsizor business leaders, or campaigning for a prominent political position. If [my daughter] runs into trouble at home or abroad the Evilsizor name will provide her with a certain level of protection through its global recognition and respected reputation."

Joseph opposed the request. He argued that the attempt to change their daughter's name was part of a larger effort by Keri to alienate him from their daughter. Joseph disputed Keri's positive reports about her son taking the Evilsizor name, stating there had been conflict over the son wanting to use his father's last name. He also disputed that Keri's extended family was known as Evilsizor, attesting that Keri's siblings, cousins, aunts, uncles, nieces, and nephews all had different paternal names.[4] Joseph also disputed that the family had an overwhelming positive reputation in the community. Finally, Joseph argued that having a hyphenated legal name would be unwieldy, it would not be in his daughter's best interests to use different names for different purposes, and having the word "Evil" in her last name could negatively affect her under an established "Nominative Determinism" theory that a person's name can affect them (i.e., Usain Bolt "is the world's fastest man").

At the hearing on the motion to change the daughter's name, Keri spoke about the importance of her family name, testifying that "we were commissioned from the French from Louis whatever, a documented history, to come over from Germany. So I know lineage back from Germany the Evilsizor name coming over to help fight with the Americans and the French/American war." Keri denied that she and Joseph had agreed to give their daughter the surname Sweeney, claiming that she told Joseph she would keep the Sweeney name for her daughter only if they stayed married but would move to hyphenate it if they divorced. When pressed by the trial court on why the surname Sweeney was placed on the daughter's birth certificate, Keri testified, "Well, I didn't

[4] Keri acknowledged in response to the trial court's questioning at the hearing on her motion that she had only one nephew with the last name Evilsizor, and "[a]fter that there's no more Evilsizors," because she had only sisters and no brothers.

agree to it, and he did it." Joseph disagreed with Keri's version of events, testifying that he did not coerce Keri to name their daughter Sweeney and there was no agreement that keeping the name Sweeney was contingent on Keri and Joseph remaining married.

Keri apparently modified her name-change request somewhat, stating that her daughter could be known by her hyphenated name, which she testified "isn't such a bad name for every-day use. It's not—it flows. It's cute. It's a cute name. That I don't think it needs to—we can both share in the pride of having her as our daughter, equally." Joseph argued that there continued to be conflict between Keri and her son's father about the son's hyphenated name, and he (Joseph) wanted to avoid having the same type of conflict over his daughter's name. He further contended that the effort to change his daughter's surname was part of Keri's attempt "to marginalize me as much as possible."

The trial court denied the request to change the daughter's name, stating it was "largely because this is the name that was agreed upon by both of the parents at the time [of birth]." Keri appealed from the order denying her request to modify the daughter's surname.

2. Substantial evidence supports the trial court's denial of Keri's request to modify the daughter's surname.

"[T]he sole consideration when parents contest a [child's] surname should be the child's best interest." (*In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 647.) This is true whether the dispute arises at birth or at some later time. (*In re Marriage of Douglass* (1988) 205 Cal.App.3d 1046, 1054.) But "where a child has used a particular surname for a substantial period of time without objection by either natural parent, the court, upon petition of one of the natural parents to change the child's surname over objection of the other natural parent, should exercise its power to change the child's surname *reluctantly*, and only where the substantial welfare of the child requires the change." (*Donald J. v. Evna M.* (1978) 81 Cal.App.3d 929, 937, italics added.) "Factors to be considered in determining the best interest of the child include the length of time that the child has used a surname; the effect of a name change on preservation of the father-child relationship; the strength of the mother-child relationship; and identification of the child as part of a

family unit. [Citation.] The court should balance 'the symbolic role that a surname other than the natural father's may play in easing relations with a new family' against 'the importance of maintaining the biological father-child relationship,' and also consider the embarrassment or discomfort the child might experience if he or she bears a surname different from the rest of the family. [Citation.]" (*In re Marriage of McManamy & Templeton* (1993) 14 Cal.App.4th 607, 609-610, quoting *Schiffman*, at p. 647.) We review the trial court's order to determine whether it is supported by substantial evidence, contradicted or uncontradicted. (*Marriage of McManamy & Templeton*, at p. 610.)

In arguing that the trial court erred in declining to modify her daughter's surname, Keri places great weight on the evidence she presented below, dismisses the evidence that Joseph presented, and argues that her evidence shows it was in their daughter's best interests to modify her surname. Keri also contends that by focusing on the parties' agreement to give the daughter the surname Sweeney, the trial court's decision was improperly "based more on a 'contract' analysis" than on the principles enunciated by the California Supreme Court in *In re Marriage of Schiffman*, *supra*, 28 Cal.3d 640. To the contrary, the trial court stated it had read "the three cases on point" (*In re Marriage of Schiffman*; *In re Marriage of McManamy & Templeton*, *supra*, 14 Cal.App.4th 607; and *In re Marriage of Douglass*, *supra*, 205 Cal.App.3d 1046), and it mentioned the parties' agreement as a way to distinguish this case from prior caselaw where the parties had not agreed on a name at the time of their children's birth. (*Schiffman*, at p. 642 [parents separated before child's birth]; *Douglass*, at p. 1048 [same].) Just because the trial court commented on Keri and Joseph's agreement does not demonstrate that the court failed to recognize or apply the applicable legal principles.

Indeed, the trial court's other comments revealed its familiarity with the proper focus on the child's best interests, acknowledging the relatively short length of time the daughter had held the surname because of her age and also noting there was no final determination of who the primary custodial parent would be. The court commented that it was its "sincere hope that no matter what the child's name is, each parent will continue to love and care for the child, and each parent's family will continue to love and care for

the child." In other words, the trial court had the daughter's best interests and the relevant factors in mind when issuing its ruling, and we see no reason to set it aside based on the record before us. (*In re Marriage of McManamy & Templeton*, *supra*, 14 Cal.App.4th at p. 610 [appellate court's power begins and ends with determination as to whether trial court's order on petition to change child's surname is supported by substantial evidence, even if evidence was contradicted].)

III.
DISPOSITION

The trial court's September 5, 2014 order awarding Joseph Sweeney attorney fees is affirmed. The trial court's July 25, 2014 order denying Keri Evilsizor's request to change the surname of the minor child is also affirmed. Joseph shall recover his costs on appeal.

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Humes, P.J.

We concur:

_____
Dondero, J.

_____
Banke, J.

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